



Decision

Matter of: AeroSage, LLC--Reconsideration

File: B-417289.4; B-417289.5; B-417289.7

Date: July 25, 2019

David M. Snyder for the protester.
May Sena, Esq., and Matthew Vasquez, Esq., Defense Logistics Agency, for the agency.
Uri R. Yoo, Esq., and Laura Eyester, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

Requests for reconsideration of prior decisions are dismissed where the requesting party asserts new arguments that could have been, but were not, presented during the initial protests, repeats arguments previously made, and generally disagrees with our decisions.

DECISION

AeroSage, LLC, a service-disabled veteran-owned small business of Tampa, Florida, requests that we reconsider our decision in AeroSage, LLC, B-417289.2, May 14, 2019, in which we dismissed in part and denied in part its pre-award protest of request for quotation (RFQ) No. SPE605-19-Q-0256, issued by the Defense Logistics Agency (DLA) for diesel fuel. AeroSage also requests that we reconsider our decision in AeroSage, LLC, B-417289.3, Apr. 2, 2019 (unpublished decision), in which we dismissed its protest alleging that DLA improperly issued an award under the same RFQ to East River Energy, Inc., a small business of Guilford, Connecticut.

We dismiss the requests for reconsideration.

BACKGROUND

The RFQ was issued on February 8, 2019, as a small business set-aside pursuant to the commercial item and simplified acquisition procedures of Federal Acquisition Regulations parts 12 and 13, for 10,000 gallons of diesel fuel to be delivered to Fort Drum, New York. RFQ at 1. The RFQ provided that award was to be made on a best-value tradeoff basis using the following evaluation factors, listed in descending

order of importance: (1) technical specifications; (2) past performance; and (3) price. Id. at 2. The RFQ required vendors to submit quotations by 10:00 a.m. on February 11, with delivery of fuel the next day, and specified that the agency may require the vendor to sign and return the Standard Form 1449 accepting the government's offer in as little as two hours. Id. at 2-3.

AeroSage filed a pre-award protest with our Office prior to the time for receipt of quotations on February 11. The protester initially filed its pre-award protest of RFQ No. SPE605-19-Q-0256 (RFQ No. 0256) as a supplemental protest in its post-award challenge to the agency's actions under RFQ No. SPE605-19-Q-0253 (RFQ No. 0253), docketed as B-417289.1. Our Office determined that RFQ No. 0256 was a separate procurement and required AeroSage to refile its pre-award challenge to its terms as a separate protest. Notice of Refiling Requirement and Electronic Protest Docketing System (EPDS) Filing Fee Determination, B-417289.1, Feb. 14, 2019.

AeroSage refiled its protest, which was docketed as B-417289.2. In that protest, AeroSage alleged that: (1) the agency improperly cancelled RFQ No. 0253 and resolicited the same requirement under RFQ No. 0256 to avoid making an award to AeroSage; (2) the RFQ unreasonably required vendors to provide written acceptance of the government's offer in two hours or less; and (3) the agency improperly failed to implement the statutory stay of performance under the Competition in Contracting Act of 1984 (CICA). Protest, B-417289.2, at 2; Comments at 1.

On May 14, 2019, our Office dismissed in part and denied in part this pre-award protest. AeroSage, LLC, B-417289.2, supra. We dismissed the first allegation for failing to state a valid basis of protest because the protester's arguments were not supported by fact. We concluded that the two solicitations were separate procurements for two distinct fuel deliveries to Fort Drum, awards were made to two different vendors under the two separate RFQs, and Fort Drum received two fuel deliveries from the two different vendors. Id. at 3-4. We denied the second protest ground because we concluded that a two-hour response time for acceptance of an offer from the agency was not unreasonable in light of the short time between receipt of quotations and delivery. Id. at 5. Finally, we dismissed the third protest ground because, even though the agency failed to withhold award or suspend contract performance after receiving notice of the protest from our Office, an agency's failure to comply with the statutory CICA stay requirement was not a valid basis of protest. Id. at 5-6.

On February 11, subsequent to the protester filing the pre-award protest, the agency issued an award under RFQ No. 0256 to East River Energy and notified all unsuccessful offerors. Protest, B-417289.3, at 1. AeroSage filed a protest challenging this award. The protester initially filed this protest as a supplemental protest in its post-award challenge to the agency's actions under RFQ No. 0253 (B-417289.1). Our Office required AeroSage to refile its post-award challenge to the award under RFQ No. 0256 as a separate protest. Notice of Refiling Requirement and EPDS Filing Fee Determination, B-417289.1, Feb. 14, 2019.

AeroSage refiled its protest, which was docketed as B-417289.3. In its protest, AeroSage again alleged that the agency improperly cancelled RFQ No. 0253 and resolicited it as RFQ No. 0256, and also argued that AeroSage should have received the award under RFQ No. 0256 as the lowest-priced technically acceptable vendor. Protest, B-417289.3, at 1-2.

On March 20, the agency advised our Office that it discovered an error in the procurement record and proposed to take corrective action. Notice of Corrective Action, Mar. 20, 2019, at 1. The agency also denied that any arguments raised in AeroSage's protest had merit. Id. The agency further advised that East River Energy completed its performance on February 12, the delivery date specified on the RFQ. Id. Because performance was completed, the agency proposed to pay the protester's reasonable bid and proposal costs and to reimburse the \$350 protest filing fee. Id. The protester objected on various grounds, including the agency's limiting payment of protest costs to the \$350 filing fee. Response to Notice of Corrective Action, Mar. 27, 2019. Our Office agreed with the protester that the agency could not limit reimbursement of the protest costs to the filing fee, but found that none of the other reasons provided a basis to reject the agency's proposed corrective action. GAO Notice of Proposed Corrective Action, Mar. 29, 2019.

In response, the agency amended its corrective action to include reimbursement of the protester's reasonable bid and proposal costs in preparing and submitting its quotation in response to RFQ No. 0256, as well as the reasonable costs of filing and pursuing the post-award protest B-417289.3. Amended Notice of Corrective Action, Apr. 1, 2019. Our Office dismissed the protest as academic because the agency committed to provide the only corrective action available to the protester. AeroSage LLC, B-417289.3, supra. Minutes after our Office dismissed the protest, AeroSage filed its objections to the agency's amended notice of corrective action. Response to Amended Proposed Corrective Action, April 2, 2019.

Following each of our decisions in B-417289.2 and B-417289.3, AeroSage filed requests for reconsideration, docketed as B-417289.7 and B-417289.4,¹ respectively.

DISCUSSION

In its requests for reconsideration, AeroSage primarily argues that our decisions were based on legal and factual errors and also failed to consider relevant information.

¹ On April 3, 2019, AeroSage filed its request for reconsideration of our decision in B-417289.3, which was docketed as B-417289.4. On April 8, 2019, however, AeroSage filed what appears to be a revised version of the initial request for reconsideration. As the April 8 filing was still timely, it was docketed as B-417289.5 and considered a supplemental request to the request docketed as B-417289.4. Unless otherwise noted, references to the request for reconsideration in B-417289.4 refer to the revised document filed on April 8, 2019 and docketed as B-417289.5.

Under our Bid Protest Regulations, to obtain reconsideration the requesting party must set out the factual and legal grounds upon which reversal or modification of the decision is deemed warranted, specifying any errors of law made or information not previously considered. 4 C.F.R. § 21.14(a). The repetition of arguments made during our consideration of the original protest and disagreement with our decision do not meet this standard. Epsilon Sys. Solutions, Inc., B-414410.3, Sept. 20, 2017, 2017 CPD ¶ 292 at 3. Additionally, a party's assertion of new arguments or presentation of information that could have been, but was not, presented during the initial protest also fails to satisfy the standard for granting reconsideration. Department of the Navy--Recon., B-405664.3, May 17, 2012, 2013 CPD ¶ 49 at 2; Precise Mgmt., LLC--Recon., B-410912.2, June 30, 2015, 2015 CPD ¶ 193 at 4. For the reasons discussed below, we find that AeroSage has failed to meet the required standard for a request for reconsideration.

Request for Reconsideration of Pre-award Protest, B-417289.2²

AeroSage argues that the decision regarding its pre-award protest was erroneous because it: (1) intentionally misrepresented or failed to consider relevant facts when we required that the protester re-file its protests, re-docketing them separately as B-417289.2 and B-417289.3, and disregarded "supplemental clarifying assertions" in its re-filed protest concerning the alleged cancellation of RFQ No. 0253 and resolicitation of RFQ No. 0256; (2) failed to consider all relevant facts in finding the RFQ's 2-hour window for an offeror to accept an agency offer to be reasonable; and (3) ignored the agency's failure to implement the stay of award or performance under CICA as evidence that the agency engaged in bad faith. Request for Reconsideration, B-417289.7, at 1-3. We find that the protester repeats arguments raised in connection with the initial protest and generally disagrees with our decision.

First, the protester alleges that the decision errs in dismissing for failure to set forth sufficient basis of protest its allegation that RFQ No. 0256 was an improper cancellation and re-solicitation of the same requirement solicited under RFQ No. 0253. Id. at 2. In this regard, the protester specifically argues that the pleadings filed in the protest set forth sufficient basis of protest and that our Office "attempt[ed] to misrepresent the protest" by "redocketing/refiling of the facts of this protest." Id.

As noted above, the protester initially filed this pre-award protest on February 11 as a supplemental protest in a protest of the procurement under RFQ No. 0253 (B-417289.1). Our Office determined that the protester must re-file its protest as a separate protest because is post-award challenge to the award under RFQ No. 0253 and its pre-award protest of RFQ No. 0256 were not relatedly sufficiently enough to allow the protester to avoid payment of an additional protest filing fee. Notice of Refiling Requirement and EPDS Filing Fee Determination, B-417289.1, Feb. 14, 2019.

² Unless otherwise noted, references to the record in this section refer to the documents filed in the docket for B-417289.2.

When the protester re-filed its pre-award protest of RFQ No. 0256 after the close of business on February 14, its filing was different from the timely protest it filed on February 11, and added new assertions and attachments. See Refiled Supp. Protest, Feb. 14, 2019. Upon the agency's request for clarification, our Office determined that the agency only needed to respond in its agency report to the single issue identified by our Office in the protester's original protest filed on February 11. See GAO Notes, EPDS Docket Entry No. 6, Feb. 21, 2019.

In its request for reconsideration, AeroSage specifically objects to the decision that the agency did not need to address certain additional grounds the protester alleged in the version of its protest refiled on February 14, arguing that they constituted timely made supplemental protest grounds under 31 U.S.C. § 3554(a)(3). Request for Reconsideration, B-417289.7, at 2. This contention was not raised during the original protest, and the protester has not explained why it could not, or did not, raise this argument earlier. AeroSage's raising these arguments for the first time in its reconsideration request cannot provide a basis for us to reconsider our earlier decision. Department of the Navy--Recon., supra, at 3.

With respect to the dismissal of the protest allegation for failure to state a valid basis of protest, in our decision we explained that RFQ No. 0256 and RFQ No. 0253 were separate procurements. Specifically, the agency provided documents evidencing award of the purchase order under RFQ No. 0253 to Infinite Energy Corporation on February 7, 2019, and delivery of the purchased fuel by Infinite Energy on the same day. See Agency Report (AR), B-417289.1, Tab 12, Purchase Order SPE605-19-P-8783, Feb. 7, 2019; AR, B-417289.1, Tab 25, Email from Infinite Energy Corporation Confirming Delivery, Feb. 7, 2019; AR, B-417289.1, Tab 26, Invoice from Infinite Energy Corporation. The record also showed that the agency issued RFQ No. 0256 on February 8 (after the delivery under RFQ No. 0253 was completed); the agency issued the purchase order under RFQ No. 0256 to a different awardee, East River Energy, Inc., on February 11; and East River Energy completed delivery under the purchase order on February 12. See Protest, Att. C, FBO Announcement for RFQ No. 0256, Feb. 8, 2019; Protest, B-417289.3, Att. 3, Purchase Order SPE605-19-P-8793, Feb. 11, 2019; Notice of Corrective Action, B-417289.3, Exh. 1, Bill of Lading, Feb. 12, 2019.

On this record, we see no error in our finding that the protester failed to set forth sufficient basis of protest when it alleged that RFQ No. 0256 was an improper re-solicitation of the same requirement procured under RFQ No. 0253. AeroSage's arguments here, again, repeat arguments previously made and generally express disagreement with our decision to dismiss the protest. See Epsilon Sys. Solutions, Inc., supra.

Next, the protester argues that the decision was erroneous in concluding that the 2-hour response time for acceptance of an offer from the agency was reasonable under the circumstances. In this regard, the protester alleges that the "circumstances of the unreasonable terms were addressed in the original protest, supplemental protest,

responses to [request for dismissal], response to AR, and supplemental protest” and the record “repeatedly articulated the practical realities of timing and supplier system of providing commercial fuel assisted acquisitions like this one, and why the resolicitation terms were unreasonable.” Request for Reconsideration, B-417289.7, at 2.

The record shows, and the protester admits, that AeroSage made this same argument in its initial protest, as well as in its response to the agency’s request for dismissal and its comments to the agency report. See Protest at 2; Response to Agency Request for Dismissal at 3-4; Comments at 2. Our decision specifically addressed this issue and explained that what constitutes a reasonable opportunity to respond depends on the circumstances of the individual acquisition and that the contracting officer had broad discretion with respect to appropriate response time. AeroSage, LLC, B-417289.2, supra, at 5. Further, our decision concluded that where the RFQ required delivery of the fuel on the day after receipt of quotations, a 2-hour response time was not unreasonable, and that AeroSage’s arguments amounted to nothing more than disagreement with the agency’s exercise of its discretion. Id. Thus, our Office found no basis to sustain AeroSage’s protest on this ground. The protester’s arguments in its request for reconsideration in this regard are nothing more than its disagreement with our decision.

Finally, AeroSage objects to the decision that the agency’s failure to implement the statutory stay of award is not a matter for consideration by our Office. In making this objection, AeroSage acknowledges that our Office does not enforce the stay of award, but argues that an agency’s failure to implement the stay is a matter for our consideration “as a prima facie evidence of bad faith” by the agency. Request for Reconsideration, B-417289.7, at 3.

The record shows that AeroSage argued bad faith on the part of the agency in its protest, and our decision addressed this argument. We explained that, as a general matter, government officials are presumed to act in good faith, and a protester’s contention that procurement officials were motivated by bias or bad faith must be supported by convincing proof. AeroSage, LLC, B-417289.2, supra, at 2 n.2 (citing Cyberdata Techs., Inc., B-417084, Feb. 6, 2019, 2019 CPD ¶ 34 at 6). We also explained that evidence establishing a possible defect in an agency’s action generally is not sufficient in itself to establish that the agency acted in bad faith. Id. Thus, our Office found AeroSage’s allegations, even if true, would not provide convincing proof of bad faith. Id. Likewise, although the agency here failed to withhold award or suspend contract performance after receiving notice of the protest from our Office, this failure alone, without more, does not show that the procurement officials were motivated by bias or bad faith. See Cyberdata Techs., Inc., supra. In this regard, AeroSage’s disagreement with our decision fails to provide a legally sufficient basis on which to reconsider our prior decision. See Epsilon Sys. Solutions, Inc., supra.

Request for Reconsideration of Post-award Protest, B-417289.3³

As noted above, our prior decision dismissed the post-award protest as academic because the agency committed to provide the only corrective action we could have recommended were we to have sustained the protest of an already performed contract award. AeroSage LLC, B-417289.3, supra, at 2. In this regard, the contract was fully performed prior to our decision. Id. Accordingly, we concluded that the only available relief for the protester was reimbursement of its bid or proposal costs and costs associated with pursuing its protest, which the agency committed to provide. Id.

In the request for reconsideration, the protester argues the decision is erroneous because: (1) the agency's proposed corrective action did not provide the only relief our Office could have recommended; (2) the decision failed to consider additional, relevant facts it alleged in its objections to the corrective action filed after our Office dismissed the protest; and (3) the decision only allowed recovery of costs associated with its protest in B-417289.3. Request for Reconsideration, B-417289.5. We find that the protester repeats arguments raised in connection with the initial protest and generally disagrees with our decision.

AeroSage first argues that the decision erred in concluding that the agency's proposed corrective action provided the only relief our Office could have recommended. Specifically, the protester argues that our Office "should provide a recommendation encompassing actions which will effectively ensure correction of repeated Agency non-compliance with acquisition laws," including "referral for further investigation" and "correct[ing] the documented improprieties, and intentional violation of CICA in regard to ensuring compliance." Id. at 2.

As noted, the agency initially notified our Office of its intent to take corrective action and stated that the performance under the protested procurement was complete. The agency proposed to pay the protester its "reasonable bid and proposal costs in preparing and submitting its quotation in response to RFQ No. [0256, plus the \$350 filing fee for filing protest B-417289.3." Notice of Corrective Action, Mar. 20, 2019. AeroSage objected to the proposed corrective action, arguing that the proposed reimbursement "fails to truly correct the improprieties" and requesting additional remedies. Response to Corrective Action, Mar. 27, 2019, at 2. Specifically, AeroSage requested award of the current requirement to AeroSage, arguing that even if "award performance was not properly stayed [in accordance with] CICA, the award could still be made to AeroSage"; referral of the contracting officer and the "delivering vendor" to the Inspector General of the Department of Defense and to the Department of Justice for investigation; and payment of all protest costs. Id.

³ Unless otherwise noted, references to the record in this section refer to the documents filed in the docket for B-417289.3.

In our decision, we specifically noted that the protester objected to the agency's proposed corrective action for several reasons. AeroSage LLC, B-417289.3 at 2 n.2. We explained that while we agreed with the protester that the agency could not limit payment of protest costs to only the \$350 filing fee, "[w]e reviewed each of the protester's additional objections, and found none provided a basis to reject the agency's proposed corrective action." Id.

In this regard, we explained that while award of a purchase order is one of the remedies our Office may recommend, here, performance was completed. GAO Notice of Proposed Corrective Action, Mar. 29, 2019, at 1. We further explained that referral of an individual agency official or contractor for investigation is not an available remedy in a GAO bid protest. Id. at 1-2. Consequently, AeroSage's arguments here are disagreements with our decision and, without more, do not meet the standard for reconsideration set forth in our regulations. See Epsilon Sys. Solutions, Inc., supra.

The protester also argues that the decision "obviously did not consider . . . the documented un rebutted assertion that the Agency repeatedly violated CICA stay requirements, the Agency history of not-being reasonable in payment of bid and protests costs, the systemic misrepresentations on awards, stays, and stay overrides" alleged in its objections to the agency's amended notice of corrective action. Request for Reconsideration, B-417289.5, at 1. In this regard, AeroSage filed its response to the agency's amended notice of corrective action after we issued our decision. In its filing, AeroSage repeated some of the same objections it raised in its response to the agency's initial notice of corrective action. AeroSage also raised other objections, mainly that the amended corrective action failed to address the underlying improprieties alleged in the protest.

As our decision explained, dismissal of the post-award protest as academic was appropriate because the only corrective action our Office could have recommended were we to have sustained the protest of an already performed contract award was reimbursement of its bid or proposal costs and costs associated with pursuing its protest, which the agency committed to provide. Accordingly, AeroSage has not presented any legal or factual argument, in its request for reconsideration or its objections to the amended corrective action, evidencing that our decision was erroneous. Rather, these arguments are disagreements with our decision and, without more, do not meet the standard for reconsideration set forth in our regulations. See Epsilon Sys. Solutions, Inc., supra.

Finally, AeroSage objects to our decision to limit the recovery of protest costs to those associated with protest B-417289.3. In this regard, the protester argues that it is entitled to recover costs associated with its protests in B-417289.1 and B-417289.2 because the agency violated the mandatory stay under CICA by awarding, and failing to stay the performance of, the purchase order under RFQ No. 0256, while those protests were pending. Request for Reconsideration, B-417289.5, at 2-4. The protester also contends that the agency has a track record of unreasonableness in never accepting all of the certified protestor bid and protest costs. Id. at 4.

As noted above, our Office properly decided that AeroSage's filings docketed as B-417289.1, B-417289.2, and B-417289.3 should be filed separately. Specifically, our Office determined, based on the record, that RFQ No. 0253 and RFQ No. 0256 were separate procurements for separate requirements, solicited on different dates and awarded to, and performed by, different contractors. See AeroSage, LLC, B-417289.2, at 3-4. Moreover, B-417289.2 was filed as a pre-award protest of the terms of the solicitation of RFQ No. 0256, while B-417289.3 was a protest of the award under RFQ No. 0256. Accordingly, our Office determined that the three protests represent three distinct protests that must be docketed separately. Notice of Refiling Requirement and EPDS Filing Fee Determination, B-417289.1, Feb. 14, 2019, at 1. Further, at the time our Office dismissed the protest in AeroSage, LLC, B-417289.3, supra, both of the related protests, AeroSage, LLC, B-417289.1, and AeroSage, LLC, B-417289.2, were still open and pending in our Office.⁴ Therefore, AeroSage's disagreement with our decision to limit the protester's recovery of bid preparation costs to those associated with RFQ No. 0256 and protest costs to those associated with protest B-417289.3 does not meet the standard for reconsideration set forth in our regulations. See Epsilon Sys. Solutions, Inc., supra.

As noted, AeroSage also argues that the agency has a "track record of unreasonableness in never accepting all the certified protestor bid and protest[] costs, while repeatedly asking for additional documentation." Request for Reconsideration, B-417289.5, at 4. To the extent the protester's allegation here concerns anticipated agency actions with respect to the reimbursement of its costs associated with RFQ No. 0256 and protest B-417289.3, we find the argument to be speculative and premature. As our decision noted, the protester was required to submit its certified claim for costs, detailing the time expended and costs incurred, directly to the agency within 60 days after receipt of the decision. AeroSage, LLC, B-417289.3, supra, at 2. The protester has not alleged that it has submitted its certified claim for costs to the agency or that the agency has rejected such claim.⁵ Therefore, we dismiss the protester's contentions regarding anticipated agency action with respect to its future claim for costs, based solely on a "track record," as speculative and premature.

⁴ Subsequent to the protester's request for reconsideration of our decision in AeroSage, LLC, B-417289.3, supra, our Office issued separate decisions in both of the related protests, AeroSage, LLC, B-417289.1, on April, 24, 2019, and AeroSage, LLC, B-417289.2, supra, on May 14, 2019. In both decisions, our Office denied in part and dismissed in part the protester's challenges to the agency's actions. Consequently, the protester is not entitled to reimbursement of its costs in either of the two protests. See 4 C.F.R. § 21.8(d).

⁵ On June 5, 2019, AeroSage filed with our Office a request for recommendation of the costs to be reimbursed for the costs of filing and pursuing its protest in B-417289.3, which has been docketed as B-417289.8 and remains pending as of the date of this decision.

The requests for reconsideration are dismissed.

Thomas H. Armstrong
General Counsel